89-623 (1)

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DOMINGO AVILA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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OCTOBER 1989

34 pp

QUESTION PRESENTED

Whether the Petitioner was denied due process of law when his conviction was affirmed, where the facts clearly show the conviction was partially based upon inadmissible evidence, the admission of which, contrary to the Air Force Court of Military Review's finding, cannot be characterized as anything except prejudicial error.*

* This question and petition are presented to this Honorable Court pursuant to Article 70(c)(1) of the Uniform Code of Military Justice, 10 U.S.C. § 870(c)(1) (Supp. III, 1985), and *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

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IN THE

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No. ———

DOMINGO-AVILA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Domingo Avila, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in this case on September 1, 1989.

OPINIONS BELOW

The initial decision of the United States Air Force Court of Military Review was reported as *United States v. Avila*, 24 M.J. 501 (A.F.C.M.R. 1987), and is reproduced in Appendix A to this petition. The United States Court of Military Appeals reversed the Court of Review and remanded the case to test an evidentiary error for prejudice, *United States v. Avila*, 27 M.J. 62 (C.M.A. 1988), reproduced in Appendix B to this petition. The subsequent decision of the Air Force Court of Military Review, finding the error harmless, was unpublished,

United States v. Avila, ACM 25577 (f. rev.) (A.F.C.M.R. Dec. 22, 1988), reproduced in Appendix C of this petition. The Court of Military Appeals subsequently granted review of, and summarily affirmed by order, the Air Force Court of Military Review's decision that the evidentiary error was harmless, reproduced in Appendix D to this petition.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. III, 1985) and 10 U.S.C. § 867(h) (Supp. III, 1985). The judgment of the United States Court of Military Appeals was entered on September 1, 1989.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . . .

STATEMENT OF THE CASE

The petitioner, an Air Force sergeant (E-4), was tried by a general court-martial on May 6 through 9, 1986. Contrary to his plea, he was convicted by a court, composed of members,[1] of sodomizing his four year old stepdaughter, Diana. At trial, the prosecution produced two witnesses: Diana and Dr. Kathleen Mayers, a clinical psychologist. Over defense objection, the military judge permitted Dr. Mayers, pursuant to Mil.R.Evid. 803(4), to testify as to what Diana had told her regarding the alleged sodomy. (R. 237-241). The defense objection was founded upon the fact that the information obtained by Dr. Mayers from Diana was not obtained for medical purposes and therefore did not qualify as an ex-

[1] The terms "members" or "court members" refer to military jurors.

ception to the hearsay rule as set forth in Mil.R.Evid. 803(4). On appeal to the United States Air Force Court of Military Review, the findings and sentence were set aside on other grounds. *United States v. Avila*, 24 M.J. 501 (A.F.C.M.R. 1987). The government appealed the Air Force Court's decision. The United States Court of Military Appeals reversed the Court of Review, but held that the information obtained by Dr. Mayers from Diana failed to qualify as an exception to the hearsay rule. *United States v. Avila*, 27 M.J. 62 (C.M.A. 1988). The Court of Military Appeals remanded the case to the Air Force Court of Military Review for a determination of whether the admission of Dr. Mayers' testimony was prejudicial error. On remand, the Air Force Court found the error to be harmless[2] and affirmed the petitioner's conviction. *United States v. Avila*, ACM 25577 (f. rev.) (A.F.C.M.R. Dec. 22, 1988). Petitioner filed with the Court of Military Appeals for a grant of review of the Air Force Court's ruling that the error was harmless. After initially denying the petition, the Court of Military Appeals, on petition for reconsideration, granted review and summarily affirmed the lower court's decision. *United States v. Avila*, — M.J. — (C.M.A. Sept. 1, 1989).

REASONS FOR GRANTING THE WRIT

Every criminal defendant has the right to a fair trial in accordance with principles of due process guaranteed by the federal Constitution. However, the right to a fair trial does not guarantee an error-free trial. *United States v. Hasting*, 461 U.S. 499, 508-09 (1983) (considering the "human fallibility of the participants, there can be no such thing as an error-free, perfect trial and . . . [the] Constitution does not guarantee such a trial."); *see also, Delaware v. Van Arsdall*, 106 S.Ct. 1431, 1436

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[2] Pursuant to Article 66(c) of the Uniform Code of Military Justice, 10 U.S.C. § 866(c) (Supp. III, 1985) the Air Force Court of Military Review is vested with fact finding authority.

(1986); *Brown v. United States*, 411 U.S. 223, 231-32 (1968). In recognition of this precept, military and other federal harmless error statutes have been enacted. Article 59(a), U.C.M.J.; 10 U.S.C. § 859(a) 1982); 28 U.S.C. § 2111 (1982); *see also*, *Fed.R.Crim.P.* 52(a). These statutes essentially preclude the reversal of convictions and sentence for "errors or defects that have little, if any, likelihood of having changed the result of trial." *Chapman v. California*, 386 U.S. 18, 22 (1967); *see*, *Rose v. Clark*, 106 S.Ct. 3101, 3106 (1986). On the other hand, these harmless error rules emphasize an intention not to treat as harmless those constitutional errors that "affect substantial rights" of a party. *Chapman v. California*, *supra*, at 23.

When the error is of constitutional dimension, as in the present case, the standard of review of harmless error is necessarily strict. In *Chapman*, *supra*, this Court rejected the argument that all constitutional errors, regardless of the facts and circumstances, must automatically be deemed harmful. Nevertheless, the Court stated that when federal constitutional error is committed, reversal is required unless the reviewing court can "declare a belief that [the error] was harmless beyond a reasonable doubt." *Id.* at 24. This beyond a reasonable doubt test requires the reviewing court to find that there was no possibility that the error affected the decision of the trial. *See United States v. Kotteakos*, 328 U.S. 750 (1946); *Schneble v. Florida*, 405 U.S. 427 (1972); *Milton v. Wainwrgiht*, 407 U.S. 371 (1972).

Since *Chapman*, the Court has gradually broadened the use of harmless error analysis in the constitutional context. In *Delaware v. Van Arsdall* and *Rose v. Clark*, *both supra*, the Court took further steps in this direction, finding that violations of the right to cross-examine a testifying witness and the right to a properly instructed jury can constitute harmless errors. In *Rose v. Clark*, specifically, Justice Powell, writing for the ma-

jority, declined to include an erroneous jury instruction on intent among those violations that, under *Chapman*, require automatic reversal because they "necessarily render a trial fundamentally unfair." 106 S.Ct. 3106. The Court said "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis." *Id.* at 3106-07. Thus, these opinions indicate a willingness to apply harmless error analysis to almost any constitutional violation not explicitly exempted by *Chapman* as rendering a trial fundamentally unfair.

Against this background, the petitioner contends that the Court of Military Appeals denied him due process of law and erred to this substantial prejudice by affirming the Air Force Court of Military Review's determination that admission of Dr. Mayers' testimony was harmless error. The prosecution called two witnesses, Diana and Dr. Mayers. At the time of trial Diana was four years old. Her testimony, expectedly, was that of a four year old child: inarticulate and confusing. In contrast, Dr. Mayers' testimony was consistent and represented a synthesis of everything she had gathered from Diana. In essence, it appears Dr. Mayers explained the confusion, resolved any inconsistencies in Diana's testimony and generally provided testimony understandable to an adult. After discounting Dr. Mayers' testimony, the evidence left is confusing and difficult to understand. Thus, it appears Dr. Mayers' testimony was extremely important, if not essential to the prosecution's case. Furthermore, without Dr. Mayers' testimony to the court members it is questionable whether the prosecution could have met its burden of proof beyond a reasonable doubt. Given the significance of the inadmissible testimony, before members, it can hardly be stated with any certainty that the error did not, beyond a reasonable doubt, prejudice the petitioner. Furthermore, as Justice

Blackmun asserted in his dissent in *Rose v. Clark*, "[a] trial that was fundamentally unfair at the time it took place . . . cannot be rendered fundamentally fair in retrospect by what amounts to nothing more than an appellate review of the sufficiency of the evidence." 106 S.Ct. at 3113 (Blackmun, J., dissenting). The petitioner subscribes to that view and asserts that it accurately describes the judicial process in this case.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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United States Air Force
Counsel for Petitioner

OCTOBER 1989

APPENDICES

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 57512/AF

CMR Dkt. No. 25577

UNITED STATES,

Appellee

v.

DOMINGO AVILA (533-56-5291),

Appellant

ORDER

On consideration of the petition for reconsideration of this Court's order dated June 13, 1989, we conclude that the action taken by the Court of Military Review following our earlier consideration of this case was adequate as a matter of law. Accordingly, it is by the Court this 1st day of September, 1989

ORDERED:

That said petition is hereby granted;

That the petition for grant of review of the decision of the United States Air Force Court of Military Review is granted; and

That said decision is affirmed.

For the Court,

/s/ John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Air Force
Appellate Defense Counsel (BOYLE) Morgan
Appellate Government Counsel (TREANOR)

APPENDIX B

UNITED STATES AIR FORCE COURT OF MILITARY REVIEW

UNITED STATES

v.

Sergeant DOMINGO AVILA, FR 533-56-5291
UNITED STATES AIR FORCE

ACM 25577 (f rev)

[22 Dec. 1988]

Sentence adjudged 9 May 1986 by GCM convened at McChord Air Force Base, Washington. Military Judge: Charles E. Stevenson, Jr.

Approved Sentence: Dishonorable discharge, confinement for seven (7) years, forfeiture of three hundred nineteen dollars ($319.00) pay per month for seven (7) years and reduction to airman basic.

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Major Deborah A. Baker.

Appellate Counsel for the United States: Colonel Joe R. Lamport; Lieutenant Colonel Robert E. Giovagnoni; Lieutenant Colonel Morris A. Tanner, Jr. and Major Kathryn I. Taylor.

EN BANC

HODGSON, HOLTE, FORAY, MICHALSKI, LEWIS, BLOMMERS, KASTL and MURDOCK
Appellate Military Judges

DECISION UPON FURTHER REVIEW

PER CURIAM:

Contrary to his pleas the appellant was convicted of committing sodomy with his four year old step-daughter. The approved sentence extends to a dishonorable discharge, seven years confinement, partial forfeitures, and reduction to airman basic.

In our initial review we concluded that the court-martial lacked subject matter jurisdiction over the offense and the trial judge erred in denying the appellant's motion to dismiss. Accordingly, we dismissed the charges. *United States v. Avila*, 24 M.J. 501 (A.F.C.M.R. 1987). Thereafter, The Judge Advocate General of the Air Force certified this jurisdictional question to the Court of Military Appeals. *United States v. Avila*, 24 M.J. 121 (C.M.A. 1987). Additionally, the appellant cross-petitioned urging that the victim's statements to a psychologist did not qualify as statements for medical diagnosis or treatment under Mil. R. Evid. 803(4). *United States v. Avila*, 25 M.J. 162 (C.M.A. 1987). The Court itself specified a third issue of whether the Supreme Court's decision in *Solorio v. United States*, — U.S. — (1987), should be applied retroactively to the appellant's situation.

On 29 September 1988, the Court of Military Appeals determined that we erred in holding that a court-martial lacks subject-matter jurisdiction over off-base sex offenses against children. They also concluded that the Supreme Court's ruling in *Solorio* did apply retroactively. However, they granted the appellant's cross-petition that the victim's statements to a psychologist were not admissible under Mil. R. Evid. 803(4). The Court did not set aside the appellant's conviction, but remanded the case to us to test the admission of the statements for prejudice. *United States v. Avila*, 27 M.J. 62 (C.M.A. 1988).

A trial error that is not of constitutional dimension may be deemed harmless if it can be determined that the fact-finder was not influenced by it, or that the error had but a slight effect on resolving the question of guilt or innocence. *United States v. Mann*, 21 M.J. 706 (A.F. C.M.R. 1985); *aff'd* 26 M.J. 1 (C.M.A. 1988); *cert. denied* — U.S. —(3 October 1988). Here, the victim, a four year old child, testified that her step-father took her into the bedroom when her mother was not home, and "sucked her "boo-boo," i.e., vaginal area. She placed the incident at Christmas time 1985, and remembered that it was snowing. She indicated her step-father had been drinking when he came home, and begin to "throw things." The child also stated that her mother said she would spank her if she told anybody what her step-father had done to her.

When questioned by law enforcement investigators, the appellant indicated that he had been drinking heavily during December 1985, and sometimes he would have "periods where he couldn't remember things the next morning." He maintained that if he did assault his step-daughter, it would have had to occur during a period of intoxication.

The appellant testified that he had "lots of problems" in December 1985, and was drinking "heavily." He stated he came home "drunk" Christmas eve, and got into a fight with his wife. As a result of this, he begin "ripping up the house." This display of temper lasted about five minutes and was witnessed by his step-daughter. Approximately, two weeks later when his wife was leaving for a bible study class, his step-daughter asked her mother not to leave her "cause something terrible is going to happen to me," and make reference to a "sucking thing." The appellant explained this as a game he would play with his step-daughter where he would put his tongue in her mouth while kissing her and she would suck it. He denied ever molesting his step-daughter.

he had told others he had "blacked out" on 25 December, and telling an associate that he had been accused of molesting his daughter, but did not believe he did it unless he had been drunk.

The government's case against the appellant rests primarily on the testimony of his four year old step-daughter and statements by him to others suggesting culpability on his part. Much of the child's testimony leading up to the act of sodomy was acknowledged by the appellant to be accurate. The appellant admits, as his step-daughter related, to coming home Christmas eve in an intoxicated state and "ripping up the house." Her recitation of the incident with him is further buttressed by his direct testimony recounting his step-daughter's reluctance to be left alone with him and the reasons for it. Both the victim and the appellant testified and were subject to cross-examination. His denial of any misconduct with his step-daughter was weighed against the existing evidence—the child's testimony was likewise evaluated. In the final analysis this case turns on the degree of credibility the fact-finders choose to give each witness whom they saw and heard. We are convinced beyond a reasonable doubt as to the appellant's guilt. Article 66(c), UCMJ. We find that the inadmissible evidence had a minimal effect, if any, on resolving the appellant's guilt or innocence. Thus, we conclude that the trial judge's erroneous admission of the psychologist's testimony regarding statements the victim had made to her was harmless error. *United States v. Mann.* The findings of guilty and the sentence are

AFFIRMED.

[SEAL]

OFFICIAL:

/s/ Carole V. Petti
CAROLE V. PETTI
Clerk of Court
Court of Military Review

APPENDIX C

U.S. COURT OF MILITARY APPEALS

No. 57,512
ACM 25577

UNITED STATES,
Appellant and Cross-Appellee,

v.

DOMINGO AVILA, Sergeant, U.S. Air Force,
Appellee and Cross-Appellant.

Sept. 29, 1988

For Appellant: *Major Deborah A. Baker* (argued), *Colonel Leo L. Sergi* (on briefs).

For Appellee: *Lieutenant Colonel Morris A. Tanner, Jr.* (argued); *Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni, Major Kathryn L. Taylor* (on briefs).

Amicus Curiae: Carol B. Anderson, Esq., for Clinical Program, Wake Forest University School of Law.

Opinion of the Court

COX, Judge:

The accused was tried by a general court-martial convened by the Commander. Twenty-Second Air Force (MAC), Travis Air Force Base, California. Court hear-

ings were held on May 6-9, 1986, at McChord Air Force Base, Washington. Contrary to his pleas, the accused was convicted of committing sodomy with a female under the age of 16, in violation of Article 125, Uniform Code of Military Justice, 10 USC § 925.[1]

On March 3, 1987, the Court of Military Review, sitting *en banc*, set aside the findings and sentence, and dismissed the charges. The majority of that court concluded that the court-martial lacked "subject matter jurisdiction over the alleged offenses and that the military judge erred in denying . . . [the accused's] motion to dismiss." 24 M.J. 501, 503.

Pursuant to Article 67(b)(2), UCMJ, 10 USC § 867 (b)(2), the Acting Judge Advocate General of the Air Force certified the following issue for our review:

> WHETHER THE AIR FORCE COURT OF MILITARY REVIEW ERRED AS A MATTER OF LAW IN DETERMINING THAT THE ACCUSED'S SODOMY WITH HIS DEPENDENT STEPDAUGHTER IN THEIR OFF-BASE QUARTERS LACKED SIGNIFICANT IMPACT ON THE MILITARY AND WAS THEREFORE NOT SERVICE-CONNECTED.

In addition, we granted the cross-petition which asked that we determine:

> WHETHER THE MILITARY JUDGE ERRED BY ADMITTING DR. MAYERS' HEARSAY TESTIMONY ABOUT THE ALLEGED VICTIM'S STATEMENTS AS STATEMENTS FOR MEDICAL DIAGNOSIS OR TREATMENT UNDER M.R.E. 803(4).

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[1] The accused was sentenced to a dishonorable discharge, confinement for 10 years, partial forfeitures, and reduction to E-1. The convening authority reduced the confinement and partial forfeitures to 7 years, but otherwise approved the sentence.

Finally, we specified a third issue for review, as follows:

> WHETHER *SOLORIO v. UNITED STATES*, [483 U.S. 435,] 107 S.CT. 2924 [97 L.Ed.2d 364] (1987), SHOULD BE APPLIED RETROACTIVELY IN THIS CASE.

In view of our resolution of the specified issue, it is unnecessary for us to answer the certified issue. We conclude that the court-martial properly exercised jurisdiction over the accused by virtue of his military status. Further, we answer the granted issue in the affirmative and leave it to the Court of Military Review to determine whether the accused was prejudiced by admission of the hearsay evidence.[2]

This trial occurred after this Court rendered its decision in *United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986), that the court-martial did, indeed, have subject-matter jurisdiction over a number of off-base sex offenses against children. Our decision that service-connection did exist

> was based on various factors, including the continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned.

Id. at 256. Unlike the instant case, Solorio's victims were all military dependents of other service personnel. Service-connection was a jurisdictional predicate established by *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), as clarified by *Relford v. Commandant*, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971).

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[2] We commend government and defense appellate counsel and *amicus curiae*, the Wake Forest University School of Law Clinical Program, for their fine briefs and oral presentations.

In light of this Court's opinion in *Solorio*, the military judge below ruled that the offense was service-connected. The Court of Military Review disagreed.[3]

On June 25, 1987—almost 4 months after the Court of Military Review rendered its opinion—the United States Supreme Court overruled *O'Callahan v. Parker, supra*, and "abandoned" the requirement of service-connection. *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 2927, 97 L.Ed.2d 364 (1987). As before O'Callahan, court-martial jurisdiction now depends only on whether "a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged." 107 S.Ct. at 2933 (footnote omitted).

For offenses occurring after June 25, 1987, it is clear that military status alone is the operative test. The question we now decide is whether this same test applies to offenses committed before that date. We hold that it does.

Obviously, conduct that was legal at the time it occurred could not be made criminal retroactively, either by the legislature or the courts. As the Supreme Court has stated:

> The *Ex Post Facto* Clause is a limitation upon the powers of the Legislature, see *Calder v. Bull*, 3 Dall. 386 [1 L.Ed. 648] (1798), and does not of its own force apply to the Judicial Branch of government. *Frank v. Mangum*, 237 U.S. 309, 344 [35 S.Ct. 582,

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[3] For purposes of this appeal, we will assume, without deciding, the correctness of the Court of Military Review's conclusion that the service-connection factors present in this case were "tenuous." 24 M.J. 501-02. In previous, post-*United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986), cases, we have not had to decide the retroactivity question because the offenses were clearly service-connected. *United States v. Dale*, 25 M.J. 205 (C.M.A. 1987) (summary disposition); *United States v. Huitt*, 25 M.J. 136, 137-38 (C.M.A. 1987); *United States v. Overton*, 24 M.J. 309, 312 (C.M.A.), *cert. denied*, —— U.S. ——, 108 S.Ct. 487, 98 L.Ed.2d 285 (1987).

> 594, 59 L.Ed. 969] (1915). But the principle on which the Clause is based—the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties—is fundamental to our concept of constitutional liberty. See *United States v. Harriss*, 347 U.S. 612, 617 [74 S.Ct. 808, 81, 98 L.Ed. 989] (1954); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 [59 S.Ct. 618, 619, 83 L.Ed. 888] (1939). As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment.

Marks v. United States, 430 U.S. 188, 191-92, 97 S.Ct. 990, 992-93, 51 L.Ed.2d 260 (1977). Cf. Bouie v. City of Columbia, 378 U.S. 347, 353-54, 84 S.Ct. 1697, 1702, 12 L.Ed.2d 894 (1964), which states:

> If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

There is no question here, however of conduct being made criminal that was lawful at the time of occurrence. Committing sodomy on a minor was a crime under the laws of the State of Washington (styled as statutory rape in the first degree), Wash.Rev.Code Ann. § 9A.44.070, as defined in § 9A.44.010, as well as under the Uniform Code of Military Justice. Thus, the accused had ample warning that his conduct was criminal; he can claim "no legitimate reliance interest." *See United States v. Ross*, 456 U.S. 798, 824 and n. 33, 102 S.Ct. 2157, 2172-73 and n. 33, 72 L.Ed.2d 572 (1982).

Until recently, retroactivity questions have been resolved largely under one of two approaches. Under the first approach, the following were deemed to be *ex post facto* laws:

> 1st. Every law that makes an action done before the passing of the law; and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L.Ed. 648 (1798).

Hence, in Dobbert v. Florida, 432 U.S. 282, 292-301, 97 S.Ct. 2290, 2297-2302, 53 L.Ed.2d 344 (1977), the defendant committed capital offenses when the death penalty statute in effect did not pass constitutional muster. By the time of trial, however, the statute had been successfully revamped. The Supreme Court held that the defendant's sentence to death under the new statute was permissible because the change was "procedural, and on the whole ameliorative." *Id.* at 292 (footnote omitted). *See generally* W. LaFave and A. Scott, Substantive Criminal Law § 2.4(a)-(c) (1986). *Cf. United States v. Matthews*, 16 M.J. 354, 381 (C.M.A. 1983); *United States v. McDonagh*, 14 M.J. 415 (C.M.A. 1983).

The other broad approach, pertaining to "constitutional rules of criminal procedure," was based on an *ad hoc* assessment of these factors:

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administeration of justice of a retroactive application of the new standards.

Stovall v. Denno, 388 U.S. 293, 296, 297, 87 S.Ct. 1967, 1969, 1970, 18 L.Ed.2d 1199 (1967). If "the very integrity of the fact-finding process" was at stake, *Linkletter v. Walker*, 381 U.S. 618, 639, 85 S.Ct. 1731, 1743, 14 L.Ed.2d 601 (1965); or "the clear danger of convicting the innocent" was present, *Tehan v. Shott*, 382 U.S. 406, 416, 86 S.Ct. 459, 465, 15 L.Ed.2d 453 (1966), the new rule was applied retroactively. *See also Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Absent such dire consequences, changes were usually applied prospectively on the theory that criminals shouldn't receive a windfall if the police were following the rules in effect at the time of their actions.

Later on, however, nonretroactivity was limited to rulings which constituted "a clear break with" past precedent. *Shea v. Louisiana*, 470 U.S. 51, 105 S.Ct. 1065, 84 L.Ed.2d 38 (1985); *United States v. Johnson*, 457 U.S. 537, 553-54, 102 S.Ct. 2579, 2589, 73 L.Ed.2d 202 (1982). *See also Yates v. Aiken*, 484 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988).

Recently, in *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the Supreme Court threw out even the "clear break" exception. Now "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." 107 S.Ct. at 716. Of course, this holding does not affect *ex post facto* situations.

Under the *Griffith approach*, it appears that we have no option but to apply the Supreme Court's holding in *Solorio* retroactively to this case.[4] In another sense,

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[4] In *United States v. Carter*, 25 M.J. 471 (C.M.A. 1988), both Chief Judge Everett and I discussed overruling *United States v. Holley*, 17 M.J. 361 (C.M.A. 1984), prospectively. As an alternate

however, it is not a question of retroactivity at all. Court-martial jurisdiction is established by Articles 2 and 17, UCMJ, 10 USC §§ 802 and 817, respectively. *Solorio v. United States, supra* at 2926. In pertinent part, these provisions remain substantially unchanged from their inception. By statute, court-martial jurisdiction has always extended to all members of regular components of the armed forces. In *Solorio*, the Supreme Court concluded that *O'Callahan v. Parker* and *Relford v. Commandant*, both *supra*, were wrongly decided. The court-martial had jurisdiction over Solorio by virtue of a lawful act of Congress. The Supreme Court did not create jurisdiction where none existed before; it simply recognized the pre-existing jurisdiction. Avila was subject to court-martial jurisdiction for the same reason that Solorio was.

Turning to the evidentiary issue, Mil.R.Evid. 803(4), Manual for Courts-Martial, United States, 1984, provides an exception to the rule against hearsay in the case of statements made "*for purposes of medical diagnosis or treatment.*" It is said that "[t]he basis for the exception is the presumption that an individual seeking relief from a medical problem has incentive to make accurate statements." Drafters' Analysis, Manual, *supra* at A22-48. In this case, it appears that the 4-year-old

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holding, the Chief Judge seems to have concluded that the judge's error was harmless under the circumstances:

> In light of the painstaking manner in which the selection process was conducted, the extensive *voir dire* that was conducted, and the judge's liberality in granting challenges for cause, no need exists to reverse appellant's conviction, even though he was not granted the requested additional peremptory challenges.

25 M.J. at 477 (footnote omitted). I, on the other hand, concluded that the judge had not erred. *Id.* at 478. Thus, it appears that no relief was due Carter, whether our views on peremptory challenges were applied prospectively or retroactively.

victim, who was in foster care at the time, did not realize that she was being treated or diagnosed, or even that the psychologist was "in the business." Dr. Mayers introduced herself to the victim as "Kathy" and presented herself as "just another Mommy." She also took care not to appear to be associated with the social worker or trial counsel—people that her mother had warned her not to talk to because they were bad and were trying to take away her daddy.

Obviously, very young children will not have the same understanding or incentive as adults when making statements to persons providing health care. Nevertheless, unless it appears that the child knows at least that the person is rendering care and needs the information in order to help, the rationale for the exception disappears entirely. *See Cassidy v. State*, 74 Md.App. 1, 536 A.2d 666, 684 (Md.App.1988); Graham, *Indicia of Reliability and Face to Face Confrontation: Emerging Issues in Child Sexual Abuse Prosecution*, 40 U.Miami L.Rev. 19 (1985); J. Myers, *Child Witness Law and Practice* 358 (1987). Without such a showing—however reliable the statements might appear to be—some basis other than the "Statements for purposes of medical diagnosis or treatment" must be found if they are to be admitted.

In this case, the statements were admitted solely under Mil.R.Evid. 803(4). It is too late, therefore, to consider whether some other basis for admitting the statements might have been found. *United States v. Watkins*, 21 M.J. 224, 226 n. 2 (C.M.A.), *cert. denied*, 476 U.S. 1108, 106 S.Ct. 1956, 90 L.Ed.2d 364 (1986). However, our conclusion that the victim's statements to the psychologist did not qualify under that rule does not necessarily invalidate the conviction; rather, the error must be tested for prejudice. Art. 59(a), UCMJ, 10 U.S.C. § 859(a).

The decision of the United States Air Force Court of Military Review is reversed. The record of trial is re-

turned to the Judge Advocate General of the Air Force for remand to that court for further review.

Chief Judge EVERETT concurs.

SULLIVAN, Judge (concurring in the result):

I believe this case can be resolved on the basis of the decision of this Court in *United States v. Abell*, 23 M.J. 99 (C.M.A.1986), *cert. denied*, — U.S. ——, 107 S.Ct. 3263, 97 L.Ed.2d 762 (1987).

APPENDIX D

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 25577

UNITED STATES

v.

SERGEANT DOMINGO AVILA, FR 533-56-5291, United States Air Force

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Sentence Adjudged 9 May 1986

Decided 3 March 1987

Appellate Counsel for the Appellant: Colonel Leo L. Sergi and Major Deborah A. Baker.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni and Major Kathryn I. Taylor.

Before HODGSON, STEWART, HOLTE, FORAY, MICHALSKI, LEWIS, SESSOMS and MURDOCK, En Banc, Appellate Military Judges.

DECISION

SESSOMS, Senior Judge:

The accused was convicted, despite his pleas, of having committed an act of sodomy with his four year old step-daughter at their off-base residence in Tacoma, Washington. The sentence imposed by the members included a dishonorable discharge, confinement for 10 years, reduction to pay grade E-1, and the forfeiture of $319 per month for 10 years. The convening authority reduced the confinement and forfeiture period to seven years.

Appellate defense counsel have assigned as error (1) the failure of the military judge to grant a motion to dismiss for lack of subject matter jurisdiction, and (2) the admission into evidence of the hearsay testimony of a clinical psychologist regarding her interview with the victim. The testimony of the psychologist was determined by the trial judge to be admissible under Mil. R.Evid. 803(4) as a statement which had been taken for the purpose of medical diagnosis or treatment. Because of our disposition of the jurisdictional question we do not reach the latter issue.

The salient facts which form the basis for the jurisdictional dispute are not complicated. The wife of the appellant, Deborah, had formerly served on active duty as a member of the Air Force. On 3 April 1981, and while she was attending technical school at Sheppard AFB, Texas, she married one Michael Pollock, also an Air Force member. Within six months of the marriage Deborah gave birth to her daughter, Diana, the victim in this case. Diana has been known as Diana Pollock since birth.

Deborah and Michael Pollock lived together as husband and wife until October 1982; first in Texas, and later in the Philippines where they had been posted on a joint assignment. In an action instituted by Deborah, they were subsequently granted a divorce by a Texas court, the jurisdiction in which they were married. The decree, which was issued on 27 March 1984, provided, *inter alia*, that Michael was not Diana's biological father, and made no provision for her support. On 9 June 1984, while they were still in the Philippines, Deborah married the appellant, Sergeant Avila. She had apparently begun seeing him sometime during the previous fall.

After her return to the United States Deborah was discharged from the service because of an injury she had received in the course of her duties as a refrigera-

tion specialist. Pollock's assignment upon his return was to Buckley Field, Colorado. He was later moved to Tyndall AFB, Florida, his duty station at the time of the trial. The appellant returned from the Philippines to McChord AFB, Washington. Deborah and her daughter joined him there on 12 April 1985. The offense occurred sometime between that date and 15 January 1986.

Before denying the motion to dismiss the trial judge made detailed findings of fact regarding subject matter jurisdiction. These findings dealt with, among other things, the geography and demography of the area surrounding McChord Air Force Base, including the fact that the family residence was 3½ miles from the base. He also made findings concerning the possible effect the allegations had on the accused, Sergeant Pollock, the military mission of McChord, the impact on the morale of the accused's unit, and a wide variety of other factors which he considered to be relevant.

Perhaps the most significant finding of the trial judge on the issue of subject matter jurisdiction is the one pertaining to the relationship of Sergeant Pollock to the victim. He concluded that under the laws of the State of Washington, Pollock was presumed to be the victim's legal father because he was married to her mother at the time of her birth. As a result of this rebuttable presumption, Sergeant Pollock is a necessary party to any custody dispute that might arise in a Washington court. Apparently, it was upon this basis that the military judge concluded, and so judicially found, that Pollock was the child's legal father. We have great difficulty in understanding his rationale in reaching this conclusion, particularly in view of the fact that he also judicially determined that the child had been conceived before Deborah and Michael became acquainted. He was also aware of the particulars of the Texas divorce decree. It seems obvious to us that under these circumstances this rebuttable presumption of parenthood would be summarily

overcome if this issue were submitted for adjudication to any court of competent jurisdiction.

The Court of Military Appeals has held that, when other salient factors are present, there is a service-connection sufficient to bestow upon military courts subject matter jurisdiction of off-base sex offenses perpetrated by military members against the dependent daughters of fellow service members because of the continuing effects of the misconduct on the fathers of the victims. *United States v. Abell*, 23 M.J. 99, (C.M.A.1986); *United States v. Solorio*, 21 M.J. 251, (C.M.A.1986), *cert. granted*, — U.S. —, 106 S.Ct. 2914, 91 L.Ed.2d 543 (1986). Although many of the factors relied upon by our superior court in determining the existence of service-connection in the cases cited above are also present in this case, we believe that the tenuous relationship of Sergeant Pollock to the victim of this crime is considerably less than that of parenthood, and certainly is not sufficient to bring this case within the parameters of *Solorio*, and *Abell*, both *supra*. If the misconduct of this appellant had any perceivable effect on Sergeant Pollock, it seemed to manifest itself in the concern that he might somehow be required to become responsible for child support in the future. This is hardly the effect on the fathers of victims that the Court of Military Appeals was contemplating when deciding *Solorio* and *Abell*. We are convinced that there are no factors present in this case that are sufficiently significant to distinguish it from *United States v. Bolser*, 22 M.J. 564, (A.F.C.M.R. 1986), or *United States v. Dale*, 23 M.J. 598, (A.F.C.M.R.1986). We therefore find, as we did in those cases, that the trial court was without subject matter jurisdiction over the alleged offenses and that the military judge erred in denying the motion to dismiss.

The findings and sentence are hereby set aside and the charges are

DISMISSED.

Senior Judge FORAY and Judges STEWART, MICHALSKI, and MURDOCK concur.

HODGSON, Chief Judge, with whom HOLTE, Judge, joins (dissenting):

I dissent. See my dissenting statement in *United States v. Dale*, 23 M.J. 598, 600 (A.F.C.M.R.1986); Certificate for Review Filed, 23 M.J. 243 (C.M.A.1986).

LEWIS, Judge (dissenting):

I would find subject matter jurisdiction. The instant case is not a mirror image of *Bolser*, *Dale*, or, more recently, *United States v. Barber*, 23 M.J. 751, (A.F.C.M.R. 1987), in one critical aspect. The impact of the offense of which the appellant stands convicted extended in a tangible manner beyond his immediate household into a small, but identifiable, portion of the Air Force in the person of Sergeant Michael J. Pollock.

Sergeant Pollock was stationed at Tyndall Air Force Base, Florida, far removed from the situs of the offense. He was present at trial solely to support the prosecution's claim of jurisdiction, not because he could provide testimony relevant to the merits. Although he had been absolved both of child support obligations and the presumption of paternity by a Texas divorce decree, he did have a viable claim of "fatherhood" with respect to the victim. He was present as head of the household in the victim's home during the first year of her life. During this time he held a position *in loco parentis* to the victim. She bore his name both then and, subsequently, at the time of the offense and resulting trial. His concern, as expressed at trial, might well be characterized as more that of a potential source of child support payments than as an aggrieved parent. However, it is surely unwise to attempt to predicate jurisdictional determinations upon how an affected service member, drawn into the vortex of a criminal offense committed by another

member, happens to react. The fact that the offense did clearly and inevitably enmesh Sergeant Pollock in its legal and socio-economic consequences owing to his past familial relationship with the victim is sufficient, in my view, to establish service-connection.

My view of subject matter jurisdiction in this case represents a minority of one on this court as matters now stand. I would not be inclined to extend my view of service-connection in this case to situations in which service members with no past or present familial relationship to the victim of such an offense become emotionally or otherwise embroiled in the consequences of the offense. In other words, I believe that our past pronouncements in *Bolser* and *Dale remain* fundamentally sound.

The military judge is to be commended for his thorough and thoughtful treatment of this issue. However, in his findings and conclusions he has placed undue reliance upon highly subjective, judgmental principles which are more susceptible to stoking irresolvable debate than to defining the limits of service-connection, particularly in this most troublesome area. Examples of three such propositions advanced and discussed by the military judge are: (1) the offense is "repugnant and unconscionable" and is likely to create great concern in the military community; (2) the reputation of the military unit as a whole suffers when offenses of this nature become known in the civilian community; and, (3) cases involving child sexual abuse can best be viewed from a "national perspective," a perspective for which the Air Force is, by implication, better equipped than a given local jurisdiction.

The heinous nature of an offense, coupled with a resulting community sense of outrage, is not a very satisfactory gauge for determining jurisdiction. Few would argue that the breaking and entering of a secured hotel

room followed by the assault and attempted rape of a young lady residing therein is less than heinous. *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969). Where two communities are concerned, as in *O'Callahan* and the case before us, can we readily determine which of the two is visited by the greatest degree of public outrage? Is intensity of public outrage, if it can be measured a reliable basis for selection of a trial forum? While I am pushing this particular approach to jurisdiction to its illogical extremity, I do so with the thought that this is the invariable direction in which this approach leads.

The adverse impact on the reputation of the military unit and service resulting from crimes committed by military members within a civilian community is a factor that may legitimately be considered in conjunction with other factors bearing on jurisdiction. *United Staees v. Abell*, 23 M.J. 99 (C.M.A.1986); *United States v. Scott*, 21 M.J. 345 (C.M.A.1986); *United States v. Lockwood*, 15 M.J. 1 (C.M.A.1983). However, it is clear enough that this subjective factor was not dispositive of the service-connection issue in these cases. Service-connection should be made of sterner stuff. While such a factor certainly assists in bolstering a claim of jurisdiction grounded on more tangible factors, it helps little standing alone or as viewed in the context of other subjective factors. If military commanders are embarrassed by the unwelcome notoriety of an offense committed by a member in the local community, the reaction is both understandable and appropriate. The member's military service should be, and in most instances will be, terminated in due course. *See United States v. Barber, supra.* However, subject matter jurisdiction which purports to be, in any large measure, premised on command embarrassment suffers the same inevitable infirmity of that which is premised on the degree of community outrage.

Can a military court-martial provide a "national perspective" on the perplexing and tragic phenomenon of child sexual abuse that is likely to be lacking in a local forum? This is undoubtedly a question without answer, or, alternatively, a question with too many discordant answers, at the present time. If such a perspective existed in this case it manifested itself, in part, in the form of ten years of confinement, subsequently reduced to seven years of confinement, for one proved act of sodomy with a child. I would suggest that many observers might well argue with the contention that this type of judicial response represents the best product of our national collective wisdom on this matter.

As my fellow judges, I address the issue of service-connection only. Other matters which might otherwise be dispositive need not be reached in view of the majority's holding that the court-martial lacked subject matter jurisdiction.

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